

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)	
)	
Digital Broadcast Content Protection)	MB Docket No. 02-230
)	
)	

**COMMENTS OF VERIZON¹ IN RESPONSE TO
FURTHER NOTICE OF PROPOSED RULEMAKING**

I. INTRODUCTION

The Commission should proceed with caution, and ensure its rules protect broadcast digital television (“DTV”) content without stifling technological innovation. Any attempts to broaden the broadcast flag, such as through the creation of a “permitted” zone of redistribution, could set a dangerous precedent for future regulation of the Internet. The Commission has wisely allowed market forces to determine the shape and configuration of the Internet and the computer industry, and should not allow the broadcast flag rules to go down a slippery slope of dictating how computer manufacturers and ISPs may design their networks.

In addition, as Commissioner Adelstein warns, the Commission should be mindful “not to cut off through preemptive regulation innovation that would lead to products and

¹ The Verizon telephone companies (“Verizon”) are the local exchange carriers affiliated with Verizon Communications, Inc., and are listed in Attachment A. For purposes of this filing, Verizon includes Verizon Internet Services Inc., which provides Internet access to more than one million subscribers.

technologies that benefit consumers, manufacturers and the creative community alike.’’²

Verizon already delivers multimedia content over its DSL broadband access network, and has announced deployment of fiber to the premises technology that will have the capability of transmitting video. As the Commission is aware, technological developments in this industry are proceeding at a rapid pace, and capabilities that were unimaginable even ten years ago have become commonplace. The Commission should not adopt rules, in the name of content protection, that would stifle such development. In particular, the Commission should not allow content providers to be the gatekeepers for approval of new technologies, or further limit the ability of consumers to redistribute content.

The Commission must remain mindful of the stated goal of, and sole justification for, the broadcast flag – that is, to speed the DTV transition by providing the owners of audiovisual works with a mechanism to inhibit the indiscriminate Internet public redistribution of high value content. *See, e.g.*, Order ¶¶ 1, 8. The Commission recognized that the broadcast flag regime was designed to be a “speed bump” against mass redistribution; it was not designed to be a failsafe remedy against all possible ways of copying digital content.³ Any attempt to convert it to one would require an increased regulatory scheme that would be impossible to administer, and would impose costs and

² *See Digital Broadcast Content Protection*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 22940 (2003) (“Order” or “Notice”), Statement of Commissioner Jonathan S. Adelstein, Approving in Part and Dissenting in Part (“Adelstein Statement”).

³ Indeed, copyright owners are already attempting to use the broadcast flag as a stepping stone to further technology regulation. Specifically, music publishers have asked the Commission to expand the broadcast flag rules to prevent copyright infringement of the digital audio channel. *See* Joint Petition for Reconsideration of the National Music Publishers’ Association, *et al.*, MB Docket No. 02-230 (filed Dec. 31, 2003) (“NMPA Recon.”). There is nothing in the record before the Commission, however, to support the argument that protection of the audio track is necessary to ensure that the DTV transition continues apace.

uncertainties in the market that would actually *impede* the DTV transition, and potentially infringe on consumers' privacy rights.

II. THE COMMISSION SHOULD NOT ATTEMPT TO DEFINE A PERSONAL DIGITAL NETWORK ENVIRONMENT

The Notice seeks comment on the appropriate scope of redistribution that should be prevented by the broadcast flag regime, noting that while the Commission "believe[s] that a flag based system should prevent indiscriminate redistribution of digital broadcast content, . . . [it does] not wish to foreclose use of the Internet to send digital broadcast content where robust security can adequately protect the content and the redistribution is tailored in nature." Notice ¶ 63. The Commission's limited goal is preventing "indiscriminate" redistribution of digital broadcast television to the public, and there is no basis in the record for the Commission to embroil itself in the regulatory morass that would result from trying to do more than this.

Specifically, the Commission should not attempt to move beyond that goal, into efforts to define or regulate a "permitted" zone of redistribution, such as a "personal digital network environment" (PDNE) within which consumers could freely redistribute digital broadcast television content.⁴ In implementing the broadcast flag regime, the Commission sought to design a system that would minimize costs to consumers and manufacturers. *See* Order ¶ 11 ("We conclude that, of the mechanisms available to us today, an ATSC flag-based system is the best option for providing a reasonable level of redistribution protection *at a minimal cost to consumers and industry*") (emphasis added); *see also id.*, ¶ 21.

However, as discussed below, the increased regulation attendant with implementation of

⁴ Order ¶ 10; Notice ¶ 63. For example, a PDNE might include a consumer's home, car, boat and second home.

PDNEs would inevitably slow the rollout of new technologies and services, increase the costs of such products and services, and, ultimately, impede the DTV transition. Because this end result runs counter to the Commission's stated goal in adopting the broadcast flag – namely, *advancing* the DTV transition – attempts to define or regulate the PDNE simply do not outweigh the costs.

Moreover, it is not clear how any PDNE requirement would be administered. As an initial matter, attempts to define the PDNE would involve clumsy regulation in the field of copyright law, an area well outside the agency's expertise. The legal concept of what constitutes "fair use" of copyrighted material is a subtle, complicated doctrine that requires careful consideration of multiple factors.⁵ Thus, there is not, and likely never will be, a technology capable of clearly separating fair uses from unfair uses. Technology, whatever its form, cannot replace a judge. In particular, a PDNE can only aspire to be an awkward approximation of fair use, treating uses within the PDNE as legal and uses outside of the PDNE as illegal. No definition of a PDNE can be crafted by regulation, and implemented by technology, that will reliably ensure that consumers' existing fair use rights are respected and that unfair uses are prevented.

Finally, Verizon is not aware of any technological mechanism that exists today to determine if a recording is for personal use or mass distribution. Commission regulation allowing for a PDNE therefore would likely extend well beyond the devices currently

⁵ Determining whether a given use is fair involves considering, among other things, "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107; *see also Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569 (1994). The notion of a PDNE only arguably addresses the first factor, and certainly does not do so directly.

covered by the broadcast flag regime, and be obliged to address whatever unique new technologies might be involved in allowing a PDNE to function. In order to guarantee that PDNEs do not “leak” (*i.e.*, that consumers are unable to find ways to transmit content outside the PDNE) the Commission would likely have to regulate the structure and components of home networks and the manner in which Internet Service Providers (“ISPs”) structure their networks and serve their customers. Content providers undoubtedly would argue that the Commission should also adopt regulations requiring ISPs and other service providers to police the conduct of their customers⁶ and allow for the tracking of consumers’ use of digital content. This, of course, runs counter to sound public policy as it would impinge upon consumers’ privacy rights.⁷

In other words, a PDNE likely would lead to more onerous and intrusive regulatory actions designed to further limit consumer conduct or to plug the inevitable leaks in any PDNE scheme. This raises the danger of creating the same slippery slope to more burdensome regulation that Verizon and other commenters have cautioned against in this

⁶ In addition to being excessively burdensome, such monitoring is likely technologically infeasible. For example, ISPs are in no position to determine whether or not encrypted or even marked packets traveling over a network contain digital broadcast content.

⁷ See Order, Statement of Commissioner Michael J. Copps (“Copps Statement”) (noting, *inter alia*, that the Commission should consider the issue of personal privacy as part of the technology approval process); Adelstein Statement (stating that the Commission should “consider the impact of a technology on personal privacy and not accept any technology that intrudes too greatly into this space”). See also, Comments of the Electronic Privacy Information Center, MB Docket No. 02-230 (filed Dec. 6, 2002) (expressing myriad concerns about the impact of the broadcast flag on personal privacy); Comments of the National Cable & Telecommunications Association, MB Docket No. 02-230, at 13-14 (filed Dec. 6, 2002) (cautioning against abuses that could be made of the dataflow to consumer equipment, and stating that the Commission must limit use of the flag to instructing the receiver to protect the digital content against unauthorized distribution via the Internet); Reply Comments of the National Cable & Telecommunications Association, MB Docket No. 02-230, at 3-4 (filed Feb. 20, 2003) (same).

proceeding.⁸ Of course, such regulations would be contrary to the Commission's policy of limiting the regulatory constraints on information services, a policy in line with Congress' clear direction to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

III. NEW TECHNOLOGIES MUST BE EVALUATED ACCORDING TO OBJECTIVE CRITERIA THAT PROVIDE MAXIMUM FLEXIBILITY FOR REGULATED PARTIES AND BE APPROVED BASED ON SELF-CERTIFICATION BY THE MANUFACTURERS

Some of the most crucial questions raised in the Notice concern the approval of new content protection and recording technologies to be used under the broadcast flag regime. Specifically, the Commission asks if approval standards should be adopted and, if so, if those standards should use objective criteria. Notice ¶¶ 61-62. The Commission also asks what entity or entities should be involved in the decision-making process. *Id.* ¶ 64.

As the Commission itself recognized in adopting the broadcast flag regime, any system should minimize the regulatory burdens – and thus the associated costs – on manufacturers and consumers. Order ¶¶ 11, 21. The DTV transition – which the broadcast flag is supposed to advance – will only proceed quickly if the necessary equipment is made available to consumers rapidly and inexpensively, which, in turn, will only occur if the approval process by which manufacturers introduce new technologies is kept simple and

⁸ See Comments of Verizon, MB Docket No. 02-230 (filed Dec. 6, 2002). See also, e.g., Comments of the Computer and Communications Industry Association, MB Docket No. 02-230, at 16-17 (filed Dec. 6, 2002) (expressing concern that the broadcast flag will require many more mandates in the future); Comments of the Internet Commerce Coalition and U.S. Internet Service Provider Association, MB Docket No. 02-230, at 2-3 (filed Dec. 6, 2002) (expressing concern that the broadcast flag might be used as a springboard to further regulation); Reply Comments of WorldCom, Inc., MB Docket No. 02-230, at 1 (filed Feb. 19, 2003) (expressing concern that the broadcast flag should not be extended beyond its "limited sphere of digital broadcast television"). Indeed, the calls for more regulation have already begun. See, e.g., NMPA Recon., *supra* note 3.

flexible. Indeed, because the broadcast flag rules will apply to a wide variety of manufacturers and markets, any regulation in this area should be light.

The Commission should establish *objective* technical standards for approval of technologies.⁹ Objective standards will give certainty to manufacturers and consumers, which will facilitate investment in facilities and therefore innovation. Those developing, manufacturing, and deploying new technologies must know the standards to which those technologies will be held if they are to bring new products and services to market quickly and inexpensively. A world of subjective evaluation and approval, or approval based on the fiat of motion picture studios and/or broadcasters, would provide little incentive to innovate, lead to higher development costs (which would ultimately be passed on to consumers), and increase the time it takes to bring new products and services to market, all to the detriment of the public. It also would allow content providers to withhold approval of technologies for improper reasons, such as to gain a competitive advantage for technologies owned by the broadcasters or studios, or to leverage for concessions from manufacturers that go far beyond the limited measures set by the Commission.¹⁰

In addition, the Commission should make clear that the broadcast flag should not be converted into a way of tracking personal information. As commenters in this proceeding – as well as Commissioners Copps and Adelstein – have noted, the broadcast

⁹ In the Notice, the Commission notes that several proposals for such objective criteria have already been made. *See* Notice ¶ 62 (citing various proposals).

¹⁰ Indeed, several commissioners already have noted this concern. *See* Order, Statement of Commissioner Kathleen Q. Abernathy (“I am generally cautious when it comes to government prescribing technologies or putting too much control in the hands of one industry in making such determinations”); Copps Statement (“We reject the notion that one industry segment should have gatekeeper control over digital content protection”); Adelstein Statement (“Our procedures ensure that no industry segment has veto power over the approval of technologies for use with the flag”).

flag regime should not be allowed to intrude upon the personal privacy of consumers by collecting information about them or their viewing habits. In other words, “the broadcast flag should be about protecting digital content, not about tracking Americans’ viewing habits.” Copps Statement; *see also supra* note 7.

Once such standards are established, in the interest of flexibility and efficiency, manufacturers should be able to test their technologies against the established standards and, if the standards are met, so certify to the Commission. Once such a certification is made, the technology at issue should immediately be considered to be an “approved technology” for purposes of the broadcast flag’s compliance rules. A self-certification approach would serve the public interest, and the purpose of the broadcast flag regime, by allowing manufacturers to develop and deploy products quickly and efficiently to meet consumer demand. Moreover, it avoids putting the Commission in the middle of attempting to determine which technologies do or do not meet the applicable standards.

IV. THE COMMISSION SHOULD NOT REVOKE APPROVED TECHNOLOGIES, BUT SHOULD CONTINUE TO MONITOR WHETHER THE BROADCAST FLAG REGIME IS EFFECTIVE

In the Notice, the Commission seeks comment on whether the approval of a content protection technology should be revoked if the security of that technology is ever circumvented. Notice ¶ 65. Specifically, the Notice asks whether a technology’s approval should be revoked once it is perceived to be insecure or only when it is compromised in a significant, widespread manner. The Commission also asks whether such revocation should be on a going-forward basis or retroactive. Notice ¶ 65. These questions bring into sharp focus the potentially catastrophic dangers inherent in the technology regulation mandated by the broadcast flag. These dangers include orphaning legacy devices and

technologies, leaving consumers stranded with useless and obsolete equipment, and thus decreasing consumer confidence. *See generally* Order ¶¶ 21, 23-24 (recognizing the burdens to consumers that would result from a system that would render consumer equipment obsolete). Moreover, the threat of revocation provides a serious disincentive for technology companies to innovate. All of this, of course, runs counter to the Commission's goal of speeding the DTV transition. Accordingly, revocation of an approved technology must not be taken lightly as it could have devastating consequences, consequences that will be magnified the longer a technology is deployed.

In light of these serious consequences, revocation should not occur merely because a technology is perceived to be insecure. As the Commission has noted, with any technology seeking to impose copy control restrictions, there undoubtedly will be those who find ways to circumvent that technology. *See* Order ¶¶ 19-20. The broadcast flag is meant to be a "speed bump" to ensure that digital television broadcasts are not redistributed "indiscriminately." Order ¶¶ 14, 19. However, as with any speed bump, it will not deter individuals who are bent on speeding past the protections set by the law. To expect otherwise would only create a technological arms race that would result in an endless series of revocations followed by continual acts of circumvention for each new approved technology. That is not a fault of the technology, but instead a reality of the system chosen. The Commission did not set up a regime that was designed to be foolproof; rather, it balanced the needs of content providers against those of consumers and manufacturers, who would face increased costs from any burdensome regulations. Order ¶ 21.

If the Commission determines that there is a pattern or practice of technological compromises to approved flag technology, rather than adopting a technology by technology review – and waiting to see the ways that creative minds devise to circumvent the protections provided by newly developed systems – this instead should trigger an immediate Commission review of the efficacy of the entire broadcast flag regime. If maintenance of the broadcast flag system is dependent on engaging in the inefficient task of supervising an endless series of product revocations for technologies that have failed to meet the regulatory goals, it is not the technology but the regulatory scheme that should be revoked.

V. CONCLUSION

The Commission should refrain from attempting to define a PDNE; implement a flexible and straightforward technology approval process that assures fairness to all regulatory parties involved; and not revoke technology that has already been approved for broadcast flag purposes.

Respectfully submitted,

A handwritten signature in cursive script, reading "A Rakestraw", written in dark ink.

Ann H. Rakestraw

Michael E. Glover
Edward Shakin
Sarah B. Deutsch
Of Counsel

1515 North Courthouse Road
Suite 500
Arlington, VA 22201
(703) 351-3174
ann.h.rakestraw@verizon.com

Attorney for the
Verizon telephone companies

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THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

- Contel of the South, Inc. d/b/a Verizon Mid-States
- GTE Midwest Incorporated d/b/a Verizon Midwest
- GTE Southwest Incorporated d/b/a Verizon Southwest
- The Micronesian Telecommunications Corporation
- Verizon California Inc.
- Verizon Delaware Inc.
- Verizon Florida Inc.
- Verizon Hawaii Inc.
- Verizon Maryland Inc.
- Verizon New England Inc.
- Verizon New Jersey Inc.
- Verizon New York Inc.
- Verizon North Inc.
- Verizon Northwest Inc.
- Verizon Pennsylvania Inc.
- Verizon South Inc.
- Verizon Virginia Inc.
- Verizon Washington, DC Inc.
- Verizon West Coast Inc.
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